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PRE-PUBLICATION

Chapter 6

Protection Seekers and Preventive Justice: Immigration Detention in Australia and the United Kingdom

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Introduction

This Chapter critically explores the justifications, scope and limits of immigration detention in Australia and the United Kingdom, and makes a distinctive contribution to the developing preventive justice scholarship alongside the established criminal law/procedure and counter-terrorism focused studies.¹ We critically reflect on the combination of preventive and administrative rationales for immigration detention, and consider the anticipated harms that states claim both requires and validates prolonged periods of incarceration as a valid regulatory tool of immigration control. We examine how conventional, public law-based constraints on executive action are absent, ineffective, or present in attenuated forms in this regulatory space. Without orthodox and effective checks and balances that promote substantive and procedural justice, protracted and even indefinite periods of detention for many protection seekers have eventuated.² We conclude the Chapter by indicating how

¹ E.g. Andrew Ashworth and Lucia Zedner (eds), *Preventive Justice* (Oxford University Press, 2014) ch 10. For a critical introduction to preventive justice scholarship see Tamara Tullich's chapter.

² Prolonged detention can be properly characterised as arbitrary (or, 'disproportionate' under human rights law) when viewed in the light of the general justifications supporting detention. See, Carol S Steiker, 'Proportionality as a Limit on Preventive Justice: Promises and Pitfalls' in Andrew Ashworth, Lucia Zedner

administrative and/or judicial review processes might be reformed in each context so that the necessity and proportionality of immigration detention, including preventive rationales for detention, can be more effectively scrutinised.

Australian Perspectives

Regulating Administrative Detention

This part focuses upon the Australian government's use of detention for 'unlawful non-citizens', in particular, irregular maritime arrivals seeking refuge who are governed through prolonged deprivation of liberty. This practice occurs onshore and, also, offshore – at sea and in third countries pursuant to bilateral regional processing agreements.³

Onshore Detention

In 1992, immigration detention was conceived of as an extraordinary measure 'aimed at boat people', temporary in nature and time-limited.⁴ The measure was justified in two ways; on an administrative basis linked to effective processing and determination of entry claims and for preventive reasons aimed at the deterrence of irregular maritime migration from South East Asia.⁵

Subsequently, the *Migration Reform Act 1992* (Cth) removed important temporal constraints and established a uniform scheme of mandatory detention for all unlawful non-citizens divorced from the detainee's personal circumstances. Under the *Migration Act 1958* (Cth) detention of unlawful non-citizens⁶ by the executive, without judicial order or warrant is

and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) ch 10.

³ On offshore processing and detention, see, *AG v Secretary of Justice* [2013] NRSC 10 (18 June 2013); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369; and, *Namah v Pato* [2016] PGSC 12; SC1496 (22 April 2016).

⁴ See the *Migration Amendment Act 1992* (Cth) that inserted s 54Q into the *Migration Act 1958* (Cth) and limited detention to 273 days'; and, Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Gerard Hand).

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Gerard Hand).

⁶ Generally, any person who is not a 'lawful non-citizen' (i.e., holds a valid visa) is an 'unlawful non-citizen': *Migration Act 1958* (Cth) ss 13(1), 14(1).

authorised.⁷ Relevantly, where ‘officers’ know or suspect a person to be an unlawful non-citizen in the ‘migration zone’, or in an ‘excised offshore place’, then immigration detention is *mandatory*. For persons seeking to enter the ‘migration zone’ who would (upon effecting entry) be unlawful non-citizens, detention is *permitted*. Non-citizens liable to be detained for prolonged periods include protection visa claimants pending administrative decisions about their refugee status *and* visa eligibility, and ‘declared’ refugees (within the meaning of the 1951 *Convention Relating to the Status of Refugees* and 1967 *Protocol Relating to the Status of Refugees* – together, ‘Refugees Convention’)⁸ whose visa claims are refused or cancelled on security or adverse character grounds, but who cannot be removed or deported.

In 2008, the Australian Labor government signalled a shift away from a presumption of secure detention for unlawful non-citizens pending resolution of their legal status.⁹ This, ‘risk-based’ policy framework was infused by ‘human rights’ ideals respecting individual liberty, and prohibiting arbitrary – or disproportionate – detention.¹⁰ Unlawful non-citizens were to be initially detained for administrative reasons: health, identity, and security checks. Government policy provided that *ongoing* detention was justifiable on specific, preventive, grounds, namely:

- (1) on *protective* grounds, for non-citizens posing an unacceptable risk to the community (be it on character, security or health grounds); and
- (2) on *non-compliance* grounds, to prevent future immigration offences in respect of non-citizens who repeatedly breach visa conditions.¹¹

⁷ The key provision requiring (or permitting) detention is s 189, in conjunction with ss 196, 198.

⁸ Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁹ See Commonwealth, *Department of Immigration and Citizenship - Annual Report 2008–09*, Parl Paper No 351 (2009) 114.

¹⁰ See Commonwealth, *Immigration Detention in Australia: A New Beginning (Criteria for Release from Immigration Detention): Joint Standing Committee on Migration*, Parl Paper No 571 (2008).

¹¹ See Department of Immigration and Border Protection, *Procedures Advice Manual 3 (PAM3): Migration Act Detention Services Manual* (Canberra: The Dept, 1994) (PAM3) referencing the immigration detention values announced in July 2008.

By 2011, the policy had been effectively abandoned with unlawful maritime arrivals being detained for the duration of their processing.¹² The discord between Labor's detention policy and practice is well-illustrated by the arbitrary and discriminatory moratorium on the processing of Sri Lankan and Afghan asylum seekers' claims during 2010. This led to asylum seekers, who had arrived by boat, being warehoused in the Curtin Immigration Detention Centre in Western Australia, effectively left in limbo for months, whilst processing of their protection visa claims was suspended in a vain attempt to deter other Sri Lankan and Afghan asylum seekers from coming to Australia via unlawful means.¹³

Following the Coalition's federal election victory in September 2013, the numbers of detainees in secure detention has fallen markedly due to: (1) bridging visa grants facilitating community release; (2) use of community detention; (3) transfers of protection seekers to regional processing centres; and (4) rapid decline in irregular maritime arrivals who have been deterred or denied entry by maritime interdiction. But the average time spent in detention has risen sharply from 72 days in July 2013, to a peak of 445 days in December 2015.¹⁴ Here government policy and calculated executive inertia, rather than case complexity, may account for the protracted periods of detention for unauthorised arrivals. For those detainees arriving before regional re-settlement was introduced in July 2013,¹⁵ caught up in the backlog of asylum cases, the Coalition government simply deferred resolution of protection visa claims until legislative amendments, reintroducing temporary protection visas, with retrospective effect, were passed in December 2014.¹⁶

¹² Australian Human Rights Committee, Submission to the Joint Select Committee on Australia's Immigration Detention Network, *Joint Select Committee on Australia's Immigration Detention Network*, (August 2011) 14 [25]. Labor's policy shifted again in November 2011 when detainees were released into the community on safe haven/bridging visas (see *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336). Then, post August 13 2012, Labor's 'no advantage' policy applied, reviving offshore regional (refugee) processing.

¹³ See, Peter Billings, 'Juridical Exceptionalism in Australia: Law, Nostalgia and the Exclusion of Others' (2011) 20(2) *Griffith Law Review* 271, 296-297.

¹⁴ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (30 December 2015) Australian Government (online) 11; and Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (November 2014) (online) 56.

¹⁵ The regional resettlement policy augmented regional processing arrangements by providing for resettlement, on Papua New Guinea and Nauru respectively, and prohibited resettlement in Australia for refugees.

¹⁶ See, eg, *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, the plaintiff's detention was unlawfully prolonged for reasons related to the executive's policy of not granting permanent protection visas to irregular maritime arrivals.

In short, onshore immigration detention has been, officially, directed at protective purposes, public health and safety are said to be protected by *incapacitating* protection seekers who, upon arrival, may carry a contagious disease, or who officials consider pose an unacceptable risk to public safety/security. Detention also serves to manage those non-citizens who officials believe are a ‘flight’ risk, to prevent them absconding. Detention also serves ancillary *administrative* purposes relating to visa processing/adjudication and facilitating removal/deportation. General *deterrence* of irregular maritime migration has served as an, official, rationale justifying detention onshore in the past. But presently, deterrence only, officially, grounds extra-territorial maritime detention practices, to which attention now turns.

Maritime Detention

Operation Sovereign Borders (OSB) commenced on 19 December 2013. A decisive aspect of OSB is a maritime border security operation directed squarely at preventive aims, namely: efficiently managing migration controls, deterring people smuggling operations, mitigating the risk of harm to protection seekers by deterring hazardous maritime ventures, and promoting compliance with migration law by preventing unauthorised maritime arrivals from entering Australia. Interdiction at sea was resuscitated following a sharp rise in unauthorised maritime arrivals during 2009-2012. The strategy has been executed via ‘tow-backs’ and ‘take-backs’ and entails interception, deprivation of liberty, conspicuously unfair screening procedures and limited judicial oversight.

Tow-backs have been executed by interception at sea, coupled with returns to neighbouring transit countries. For example, asylum seekers have been intercepted en route to Australia, detained for several days on border protection vessels and then coerced into cramped and hot carceral spaces on disposable lifeboats, and towed-back to the edge of Indonesian territory. Worryingly, this has occurred without an assessment of whether Australia’s international law obligations are engaged.¹⁷

¹⁷ See Michael Bachelard, ‘Vomitous and terrifying: the lifeboats used to turn back asylum seekers’, *Sydney Morning Herald* (online) 2 March 2014 <<http://www.smh.com.au/national/vomitous-and-terrifying-the-lifeboats-used-to-turn-back-asylum-seekers-20140301-33t6s.html>>.

Equally troublesome, take-backs have involved interception at sea coupled with either direct repatriations following perfunctory screening procedures,¹⁸ or attempted ‘safe third country’ returns. In respect of the latter there was a failed attempt to return Sri Lankan interdictees to India in July 2014. The legality of this preventive action was tested in *CPCF v Minister for Immigration and Border Protection*¹⁹ (*CPCF*), considered below. Ultimately, for preventive purposes, maritime interdictees face the real prospect of a prolonged and open-ended period detained at sea, while ‘taking’ decisions are made, given effect, and arrangements are made for detainees’ disembarkation elsewhere.

Exploring Legal Constraints on Immigration Detention: Onshore

Immigration detention raises risks of executive overreach and human rights infringements, and poses a critical need for effective checks and balances. The High Court of Australia has, over many years, entertained several challenges to the legality of prolonged immigration detention. In a recent case, three judges expressed the view that immigration detention provisions are constitutionally valid only if they are for relevant statutory purposes and if they are subject to clear ‘reasonable time’ constraints.²⁰ So the bleak prospect that detention might endure for the term of a non-citizen’s natural life (countenanced in *Al-Kateb v Godwin*)²¹ is doubtful, due to implied constitutional constraints. However, these limits on immigration detention rest on the capacity of the court to identify and agree on valid statutory purposes, and an assessment of what is a ‘reasonable time’ to achieve those purposes.

Statutory Purposes

‘The common law does not recognise any executive warrant authorising arbitrary detention.’²² And immigration detention is not arbitrary because the executive’s power is

¹⁸ See, eg, Matthew Knott, ‘Asylum seekers screened at sea returned to Sri Lanka’ *Sydney Morning Herald* (online) 7 July 2014 <<http://www.smh.com.au/federal-politics/political-news/asylum-seekers-screened-at-sea-returned-to-sri-lanka-20140706-3bh3x.html>>.

¹⁹ (2015) 316 ALR 1.

²⁰ *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369 [139] (Crennan, Bell and Gageler JJ).

²¹ (2004) 219 CLR 562, 575 (Gleeson CJ), 651 (Hayne J).

²² (2013) 251 CLR 322, 369 [139] (Crennan, Bell and Gageler JJ).

constrained; it is directed to particular statutory purposes, coupled with temporal limits.²³ In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*²⁴ (M76), Hayne J observed that mandatory detention provisions served the broad preventive purpose of immigration control, ‘to control the arrival and presence of non-citizens in Australia.’²⁵ Whereas in *Plaintiff S4/2014 v Minister for Immigration*²⁶ (S4) the High Court of Australia, having identified the broad regulatory objectives of the *Migration Act 1958* (Cth), stated that mandatory detention served purely administrative purposes, namely:

the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.²⁷

This passage can be read as fully identifying the statutory purposes underlying onshore mandatory detention, though the list of permissible purposes underpinning non-citizens’ detention may not be closed.²⁸ In S4 the High Court did not expressly reject or endorse alternative statutory purposes for detention suggested in earlier cases. For example, immigration detention has been interpreted as legitimately serving an *exclusionary* purpose, by *segregating* unlawful non-citizens from the wider community.²⁹ In *Al-Kateb* two judges decided that preventing the entry of unlawful non-citizens into the community pending an entry or removal decision, was an ancillary purpose underpinning detention.³⁰ Three other judges went further, observing that entry, removal *and* exclusion from the community could justify detention. Thus, exclusion was not merely ancillary; it could justify detention *absent* other statutory purposes (which might be exhausted) related to entry, or removal.³¹ Exclusion

²³ Ibid. The temporal limits are not precisely fixed at the time detention commences, but statutory purposes must be fulfilled as soon as reasonably practicable (i.e. capable of achievement).

²⁴ (2013) 251 CLR 322.

²⁵ Ibid 366 [127] (emphasis added).

²⁶ (2014) 253 CLR 219.

²⁷ Ibid 231 [26]. See also, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369, 310 [46] (French CJ, Kiefel and Nettle JJ), 317 [94] (Bell J), 332 [184] (Gageler J), 343 [260] (Keane J), and 362 [392] (Gordon J, dissenting) (concerning offshore refugee processing on Nauru and incidental executive detention).

²⁸ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369, 360-1 [382] (Gordon J).

²⁹ Eg, *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 75-7 [222]-[228] (Hayne J).

³⁰ *Al-Kateb*, 576 [17] (Gleeson CJ), 609 [126]-[127] (Gummow J).

³¹ Ibid 584-5 [45]-[46] (McHugh J), 644-5 [247] (Hayne J), 658-9 [289] (Callinan J).

was said to advance *protective* purposes, preventing undesired infiltration of, or presence in, the community, and the attainment of *de facto* citizenship.³² Importantly – and despite the clear similarities between the lived experience of immigration detention and penal incarceration – there is no judicial recognition that immigration detention is imposed as punishment for an offence relating to unauthorised arrival.³³

Another protective purpose was implied by Heydon J in *M47 /2012 v Director General of Security*³⁴ (M47): ‘the detention of unlawful non-citizens who threaten the safety or welfare of the community because of the risks they pose to Australia’s security.’³⁵ One of the difficulties with this justification (which reflects government policy) is that detainees may be incarcerated – on protective grounds – due to adverse security/character assessments, in circumstances where they pose no real danger to the community.³⁶ This circumstance is aggravated by the fact that non-citizens with adverse security assessments subject to removal do not enjoy due process via administrative merits review,³⁷ and judicial review is largely ineffectual.³⁸

In *M76*, Kiefel and Keane JJ also identified exclusion as a discrete purpose underlying detention. Significantly, their Honours observed that even if the legislative scheme were read as constrained by both a purposive (*removal*) and temporal limitation (*reasonably practicable*) and also an implied qualification that this be effected *within a reasonable timeframe*, continued detention would, nonetheless, continue to be lawful. This was attributed

³² Ibid 584 [46] (McHugh J), 659 [289] (Callinan J). See also, *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 46–7 [115] (McHugh J).

³³ *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 14 [26] (Gleeson CJ); *M76*, 385 [207] (Kiefel and Keane JJ); *Jaffarie v Director-General of Security* (2014) 226 FCR 505, 532–3 [95] (Flick and Perram JJ) citing *Al-Kateb*, 584 [44]–[45] (McHugh J).

³⁴ (2012) 251 CLR 1.

³⁵ Ibid 136 [346]. This purpose correlates to government policy: see PAM3, above n 11.

³⁶ (Ibid 194 [534] (Bell J). The Australian Security Intelligence Organisation’s (ASIO) security assessments capture a larger cohort of refugees than those falling within the exclusionary provisions of the Refugees Convention.

³⁷ In 2012 an Independent Reviewer of Adverse Security Assessments was appointed to provide periodic non-binding reviews of adverse security assessments relating to non-citizens who engage Australia’s protection obligations (Attorney-General’s Department (Cth), *Independent Reviewer of Adverse Security Assessments* (2012) Australian Government (online)). As a consequence of this process 21 detainees were released from detention in 2014/15 (Commonwealth Ombudsman, *An analysis of reports under s 4860 of the Migration Act 1958 sent to the Minister by the Ombudsman in 2014/15* (August 2015) (online) 13).

³⁸ *Jaffarie v Director General of Security* (2014) 226 FCR 505, 521–2 [48] (Flick and Perram JJ).

to the ‘evident purpose’ (underlying s 189) of *preventing unauthorised entry* into the Australian community.³⁹

In summary, the combination of preventive and administrative purposes underlying immigration detention, and the phrasing of these aims in expansive terms, sits uneasily alongside the unanimous judgment in *S4*, which clearly stated that detention serves specific statutory purposes: removal, investigation and determination of a visa application, and to determine whether to permit a valid visa. Suffice to say, it is far from easy to disentangle and identify the legitimate purpose(s) of immigration detention.

Temporal Constraints

In *Al-Kateb*, the High Court of Australia determined that the *Migration Act 1958* (Cth) supplied a clear mandate requiring unlawful non-citizens to be detained until removed, deported or granted a visa. The law, it was held, authorised prolonged detention without a fixed end-point. The High Court was, subsequently, invited to overrule *Al-Kateb* in *M47*. *M47* was officially declared a refugee but refused a visa to enter Australia because of an adverse security assessment. Accordingly, *M47* remained in detention pending removal. It was argued that there was no reasonable prospect or likelihood of another country agreeing to admit *M47* and, because there was no realistic prospect of removal, detention was unlimited and, therefore, unlawful.

A majority of the High Court of Australia disposed of the matter in favour of *M47*, but without the need to address the arguments directed at the correctness of *Al-Kateb*. However, Gummow and Bell JJ (dissenting) determined that *Al-Kateb* should not be followed.⁴⁰ Their Honours favoured the construction of s 198 of the *Migration Act 1958* (Cth) advanced by Gleeson CJ (in the minority in *Al-Kateb*) which ‘better accommodates the basic right of personal liberty.’⁴¹ Importantly, Gleeson CJ considered that if removal of a detainee ceased to be a practical possibility, then detention must cease, at least for as long as that situation

³⁹ *M76*, 379–80 [182]–[183].

⁴⁰ *M47*, 61 [120], 68 [145] (Gummow J), 193 [533] (Bell J).

⁴¹ *Ibid* 61 [120] (Gummow J).

continues. It followed that the statutory duty of removal imposed on an immigration officer subsists, but is in abeyance, where removal is impractical.⁴²

Notably, in *M47*, Gummow and Bell JJ claimed that the majority reasoning in *Al-Kateb* was weakened by the absence of a discussion of the ‘principle of legality’,⁴³ which mandates that the legislature must manifest an intention to abrogate fundamental principles, infringe rights or depart from the general system of law (the ‘clear statement’ principle).⁴⁴ Subsequently, in *M76*, Kiefel and Keane JJ refuted that view, adding that there was no legislative lacuna and so no work for the principle of legality to do.⁴⁵ Their Honours highlighted the absence of *precise* temporal limitations on the duration of detention for removal purposes.⁴⁶

Accordingly, *Al-Kateb*, *M47* and *M76* show that the interpretation of temporal elements in the legislative scheme supporting immigration detention divides judicial opinion, and equally divisive is the applicability of the ‘principle of legality’.

Constitutional Constraints

A constitutional head of power – the naturalization and aliens power contained in s 51(xix) *Commonwealth Constitution* – supports the administrative confinement of unlawful non-citizens in detention.⁴⁷ However, the effect of Chapter III of the *Constitution* is that, certain exceptional categories aside, deprivation of liberty can only be made by judicial order on conviction for an offence after adjudication of guilt.⁴⁸ Among the recognised exceptions to this rule is that non-citizens’ liberty may be constrained for the purpose of determining questions about the person’s entry or removal or deportation. The constitutional issue is whether detention can lawfully continue when statutory purposes are exhausted (or, frustrated) and are incapable of fulfilment within a reasonable time frame.

⁴² *Al-Kateb*, 578 [22] (Gleeson CJ).

⁴³ *M47*, 60 [119] (Gummow J), 193 [532] (Bell J).

⁴⁴ *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J).

⁴⁵ Justice Hayne re-affirmed the interpretative approach his Honour adopted, as part of the majority, in *Al-Kateb*: *M76*, 366 [127].

⁴⁶ *M76*, 379 [182] (Kiefel and Keane JJ). Cf *Al-Kateb*, (Gleeson CJ, Gummow and Kirby JJ).

⁴⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

⁴⁸ Jeffrey Steven Gordon, ‘Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity From Non-Criminal Detention’ (2012) 36(1) *Melbourne University Law Review* 41.

The legislative requirement that detention is required until ‘removal is undertaken as soon as reasonably practicable’ may be read as importing a ‘reasonable time’ qualification, or else risk infringing Chapter III constraints. This idea stems from the case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁴⁹ (*Lim*) where a majority of the High Court of Australia held that immigration detention is constitutionally valid *only if* the laws that require and authorise administrative detention are ‘limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.’⁵⁰ In *M76*, Crennan, Bell and Gageler JJ revisited *Lim*, identifying a clear temporal limitation on detention:

The necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified. The temporal limits and the limited purposes are connected such that the power to detain is not unconstrained.⁵¹

Whereas, in *M76* Hayne J, confirming *Al-Kateb*, stated that the power to detain unlawful non-citizens was not unbounded, pinpointing the statutory duty to remove ‘as soon as reasonably practicable’, and purposive constraints which must be ‘ascertainable, and enforceable, [by the courts] at all times during its continuance’.⁵² His Honour harboured no doubts about the validity of laws authorising indefinite detention until removal for unauthorised non-citizens, concluding that the question of the law’s consistency ‘with basic tenets of common humanity’ was for Parliament and the polity to ponder.⁵³ Kiefel and Keane JJ agreed that the detention laws were valid; executive detention, where removal was currently unfeasible, did not violate Chapter III.⁵⁴

⁴⁹ (1992) 176 CLR 1.

⁵⁰ Ibid 33 (Brennan, Deane and Dawson JJ).

⁵¹ *M76*, 369 [139] (emphasis in original) (citation omitted). See also; *S4*, 231 [26], where French CJ, Hayne, Crennan, Kiefel and Keane JJ referred to the cited passage from *Lim* with apparent approval, and *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, 55 [184]–[185] (Gageler J).

⁵² *M76*, 359 [98]–[99].

⁵³ Ibid 367 [130].

⁵⁴ Ibid 384–5 [205]–[208].

In summary, the High Court of Australia has recognised that detention laws have temporal limits that are necessary if the laws are to satisfy constitutional requirements. Where the judges differ is whether ‘reasonable practicability of removal’ must be read so as to require removal within a ‘reasonable time-frame’ in order to be valid. In *M76* three judges (Crennan, Bell and Gageler JJ) offered support for the view that detention provisions are constitutionally valid laws if they are for relevant statutory purposes and if they are subject to clear ‘reasonable time’ constraints.⁵⁵ Otherwise powers of executive detention can be characterised as punitive laws and unconstitutional.

Exploring Legal Constraints on Preventive Detention: Interdiction at Sea

In *CPCF v Minister for Immigration and Border Protection*⁵⁶ the legality of executive detention beyond Australia’s borders, in the course of repelling protection seekers, was considered by the High Court of Australia. The Australian government relied on, inter alia, the *Maritime Powers Act 2013* (Cth) (MPA)) to defeat the false imprisonment claim brought by the plaintiff. Significantly, s 72(4) MPA enabled a maritime officer to *detain and take* a person to a place outside the migration zone, including a place outside Australia, and s 72(5) provided for the restraint of a person on a vessel for the purposes of taking a person to another place.

By a slender majority the Court decided that there was statutory authority to detain and take the interdictees to India, it was not a ‘speculative taking’, and therefore, constitutionally invalid. Pertinently, the Court rejected an alternative argument: that the actions of the maritime officers at sea were animated by an improper purpose – the *deterrence* of unauthorised maritime arrivals. The plaintiffs argued that the statutory scheme was only directed at preventing contravention of or ensuring compliance with, the *Migration Act 1958* (Cth). Only two judges, Gageler and Keane JJ, addressed this argument and expressly rejected the claim that deterrence was an extraneous purpose vis-à-vis the MPA. Gageler J observed that the government’s general policy of deterrence was consistent with the twin purposes of ensuring compliance with s 42(1) of the *Migration Act 1958* (Cth) and preventing

⁵⁵ Cf *Lim*, 73, where McHugh J doubted a long period of detention (over two years) could transform the character of immigration detention from administrative (non-punitive) to punitive.

⁵⁶ (2015) 316 ALR 1.

contravention of s 42(1) from occurring in Australia.⁵⁷ In summary, two members of the Court accepted that the MPA enabled maritime officers to intercept and detain non-citizens in the contiguous zone, and remove them to another place, as an incident of preventing a contravention of migration law pursuant to a policy of deterrence.⁵⁸

Remarkably, with the High Court of Australia's decision pending, the government moved pre-emptively to reinforce executive maritime powers to undertake turn backs.⁵⁹ The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), schedule 1, evidences a legislative intent to neutralise the effects that any negative ruling in *CPCF* might have had for Australia's interdiction policy. Critically, the 'detain and taking power' was amended confirming that a detained vessel can be taken outside Australia and that the destination can repeatedly change.⁶⁰ Plainly, for preventive purposes, maritime interdictees face the real prospect of a prolonged period detained at sea, while 'taking' decisions are made, given effect, and arrangements are made for detainees' disembarkation elsewhere. The Australian government now enjoys exorbitant powers, generating uncertainty about the duration of maritime detention. Limiting such detention to 'reasonable' periods, while relevant statutory purposes are pursued, provides a veneer of legitimacy but negligible security from protracted detention.⁶¹ This temporal constraint does not enable the deprivation of liberty at sea to be rigorously scrutinised by the courts, to guard against arbitrariness.⁶² Indeed, the United Nations Special Rapporteur on Torture observed that Australia's maritime powers risk violating the *United Nations Convention Against Torture* 'because it allows for the arbitrary detention and refugee determination at sea, without access to lawyers.'⁶³

⁵⁷ *CPCF*, 80 [365], 96 [450] (Keane J) (concurring).

⁵⁸ *Maritime Powers Act 2013* (Cth) s 41(1)(c)(ii) and *Maritime Powers Regulation 2014* (Cth) reg 8: specifically, to prevent a contravention of the *Migration Act 1958* (Cth) s 42(1).

⁵⁹ Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (2014) 7 [2.6], 18 [3.6].

⁶⁰ *Maritime Powers Act 2013* (Cth), s 72(4)(a)-(b).

⁶¹ *Maritime Powers Act 2013* (Cth) s 72A. The most direct route to a destination does not need to be taken (s 72A(2)(b)).

⁶² Although limits on the power to detain and take can be judicially reviewed to ensure powers are not frustrated or spent, this is an ineffective safeguard against arbitrary detention, per art 9(1) ICCPR.

⁶³ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez - Observations on communications transmitted to Governments and replies received* 28th sess, UN Doc A/HRC/28/68/Add.1 (6 March 2015) [30]-[31]. *Convention against Torture*

United Kingdom Perspectives

Regulating Immigration Detention

In the United Kingdom, the stated justification for immigration detention is ‘the effective maintenance of immigration control’ – the need to restrict the movement of people who have yet to persuade the State of their right to enter and remain or whom the State wishes to remove. For those who support an unfettered sovereign right to control borders and admission to territory, detention – or *incapacitation* – is regarded as necessary to prevent a risk of harm, or an actual harm, from occurring. ‘Harm’ is often related to the ‘flight risk’: the fear that the subject will abscond, disappear, commit or contribute to an undesirable act or a criminal offence.⁶⁴ Despite a low flight risk, and the requirement to use detention as a last resort, protection seekers are subject to detention for *preventive* reasons. They are increasingly likely to be detained for *administrative convenience*, rather than harm prevention – that is, their detention is argued to be facilitative for the State in some way.⁶⁵ The detention estate currently comprises ten designated immigration removal centres, which are operated by either the National Offender Management Service or private contractors. Between January and September 2015, 20,744 people entered detention.⁶⁶

Powers to Detain

The *Immigration Act 1971* (UK) contains the power to detain.⁶⁷ Before 1987, the detention of protection seekers was not routine.⁶⁸ Arguably, this was due to the perceived lack of a need to detain given the low number of asylum seekers. Until 1989 asylum claims remained below

and Other Cruel, Inhumane or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁶⁴ Detention is permissible where there is a reasonable suspicion that a crime has been committed or to prevent ‘a concrete and specific offense’: *M v Germany* (2010) 51 EHRR 976 [89].

⁶⁵ See Cathryn Costello, ‘Immigration detention: the grounds beneath our feet’ (2015) *Current Legal Problems* 1, 1-35, who differentiates between punitive, coercive and preventive detention.

⁶⁶ Home Office, *Immigration Statistics July to September 2015 - Detention Tables* (26 November 2015) Gov.UK (online). These figures include children.

⁶⁷ C 77, sch 2, para 16 and sch 3. Amendments have been made subsequently: *Immigration and Asylum Act 1999* (UK); *Nationality, Immigration and Asylum Act 2002* (UK); *Immigration, Asylum and Nationality Act 2006* (UK); *UK Borders Act 2007* (UK); *Immigration Act 2014* (UK).

⁶⁸ Dallal Stevens, ‘Asylum Seekers, Detention and the Law: Morality in Abeyance?’ in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 397.

4,500,⁶⁹ but as applications increased, reaching an all-time high of 84,130 in 2002, successive British governments introduced a range of new policies, with significant changes made to the detention regime for protection seekers.

Immigration officers and the Home Secretary possess a wide power to detain people.⁷⁰ Broadly, detention can occur pending refugee status determination, pending a decision to remove and pending removal. Immigration officers can also detain an individual at a port for up to three hours if the officer thinks the individual may be liable to arrest.⁷¹ Two remarkable, if not unique, features pertain to United Kingdom immigration detention: there is no automatic bail hearing⁷² and no statutory time limit on the length of detention. To be lawful, detention must comply with domestic legislation and meet relevant human rights obligations arising, notably, under the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights 1950* (ECHR).⁷³

Detention Policy and Guidance: The Purpose of Detention

The power to detain is *discretionary* so attention must focus on policy, operational instructions and detention centre rules for further direction on the power's implementation.⁷⁴ Operational guidance for immigration officers states that '[t]he power to detain must be retained in the interests of maintaining effective immigration control' but 'there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used'.⁷⁵ Furthermore:

⁶⁹ Home Office, *Immigration Statistics April to June 2015* (27 August 2015) Gov.UK (online) (excluding dependants).

⁷⁰ *Immigration Act 1971* (UK), c 77, sch 2, para 16 lists the circumstances where an immigration officer has authority to detain. The Home Secretary's powers to detain persons liable to deportation are contained in sch 3, and the *Nationality, Immigration and Asylum Act 2002* (UK) c41, pt 4, ss 62(1)-(2) and 71(1)-(3).

⁷¹ *UK Borders Act 2007* (UK) c 30, s 2.

⁷² *Immigration and Asylum Act 1999* (UK) c 33, ss 44-52 included routine bail hearings but these were never implemented and were removed by the *Nationality, Immigration and Asylum Act 2002* (UK) c 41, pt 4, s 68. The government has reduced the circumstances in which bail can be applied: *Immigration Act 2014* (UK) c 22, pt 1, s 7.

⁷³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol Nos 11 and 14.

⁷⁴ The United Kingdom Visas and Immigration (Home Office) also disseminate practice information directly to practitioners, which is not widely published.

⁷⁵ UK Visas and Immigration and Immigration Enforcement, *Chapters 46 to 62: detention and removals* (14 April 2016) Gov.UK (online) ch 55, 55.1.1.

Detention is **most** usually appropriate:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.⁷⁶

The policy specifies numerous factors to be assessed when considering the need for initial or continued detention: the likelihood of and timescale for removal; a history of absconding/non-compliance/breach of immigration law; the subject's age, vulnerability and ties with the United Kingdom; whether the subject has a settled address and employment; whether there are outstanding legal processes that might incentivise keeping in touch with authorities; risk of offending or harm to the public; and any history of torture, inform the immigration officer's decision about detention.⁷⁷ Furthermore, the officer or Home Secretary must inform the prospective detainee of the reasons for detention, and government policy currently details five: (1) the person is likely to abscond if given temporary admission or release; (2) there is insufficient reliable information to decide on whether to grant the person temporary admission or release; (3) the person's removal from the United Kingdom is imminent; (4) the person needs to be detained whilst alternative arrangements are made for their care; and (5) the person's release is not considered conducive to the public good.⁷⁸ Protection seekers can fall within one or more of these categories.

So, detention can take place for a range of reasons, some of which are about preventing some unspecified harm – '[the persons'] release is not conducive to the public good'; '[the person is]likely to abscond' (and become untraceable/misbehave/become a burden) – while others are more elliptical – '[the person's] removal ... is imminent; [the person] need[s] to be detained whilst alternative arrangements are made' (and they might become untraceable/misbehave/become a burden if given their liberty). The harm occasioned to the detainee is, unsurprisingly, not considered, despite the view that 'depriving a person of his or her liberty intentionally harms that person'.⁷⁹ Rather, as both law and policy make clear, the harm meted

⁷⁶ Ibid (emphasis in original).

⁷⁷ Ibid 55.3.1 and 55.14.

⁷⁸ Ibid 55.6.3.

⁷⁹ Victor Tadros, 'Controlling risk' in in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013)133, 139.

out to the subject of detention, through deprivation of liberty, is considered warranted, even in the case of the most vulnerable individuals on occasions.

Detained Fast Track

Previously, government policy stated another purpose underpinning detention: ‘The application may be decided quickly using the fast track procedures’ – otherwise known as the Detained Fast Track system (DFT). Although this reason has now been removed following the suspension of the DFT in 2015 (see below), the fast track detention of protection seekers is pertinent for our critique of preventive and administrative detention, to which our attention now turns.

Prior to the DFT process, some asylum seeker applicants were detained but the majority were not.⁸⁰ The idea of detention for mere ‘administrative convenience’ was unknown. In March 2000 this changed with the opening of the first ‘reception centre’ in Oakington, Cambridgeshire.⁸¹ The adoption of a benign term ‘reception centre’ is striking, so too the use of detention for a new purpose – for applications that can be decided quickly – detention only for the duration of the initial decision, and for a limited period ‘of about 7 days’. The rationale was that due to the high number of claimants (in 2000, this stood at 80, 315),⁸² the Home Office needed protection seekers to be available for early interview and further representations. The scheme was extended, first to Harmondsworth Removal Centre in 2003 (note the shift in terminology to ‘removal centre’) for single young men, and then to Yarl’s Wood Removal Centre in 2005, for women. Now, detention would be for the duration of initial decision *and* appeal. The Minister promised ‘we will detain straightforward claimants to enable a quick initial decision and swift removal after any appeal, providing they meet the criteria for detention’.⁸³ While Oakington could be described as ‘fast’ the new scheme was intended to be ‘superfast’: induction and substantive interviews in two days, an in-country

⁸⁰ Immigration Law Practitioners’ Association, *The Detained Fast Track Process – A Best Practice Guide* (January 2008) (online) 1.

⁸¹ United Kingdom, *Parliamentary Debates*, House of Commons, 16 March 2000, vol 364, col 385 WS (Barbara Roche).

⁸² European Union Committee, *Handling EU asylum claims: new approaches examined – Report with evidence* (30 April 2004) House of Lords (online) 15.

⁸³ United Kingdom, *Parliamentary Debates*, House of Commons, 18 March 2003, vol 401, col 42 WS (Beverley Hughes).

right of appeal within two days and the whole case, if refused, could be finalised in just five weeks.

This shift towards detention for administrative convenience can be characterised as preventive detention. The object is to ensure immediate access to individuals: to ensure they are available for examination, interview, decision, appeal and removal. Simply put, fast-track detainees were prevented from moving freely within the United Kingdom. From a harm perspective, the government argued that the asylum seeker system was under threat by the numbers, backlogs were growing, and people were waiting years for decisions. But this type of detention, ostensibly with an administrative or facilitative objective, poses a number of critical legal questions. The answers to which are complex, encompassing domestic, European Union and international law and policy.

Exploring (Legal) Constraints on Preventive Detention in the United Kingdom

Detention can be challenged in the High Court in England and Wales either by *habeas corpus* or judicial review, or by judicial review in Scotland. *Habeas corpus* applications are normally concerned with the power to detain, whereas judicial review might focus on the wider exercise of the discretion to detain.⁸⁴ The courts have a duty to guard the liberty of the person jealously, to construe broad statutory discretions narrowly and ensure they are exercised for solely for statutory purposes.⁸⁵ Where detention conditions are sufficiently poor, this may breach art 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment.⁸⁶ Pressure can also be brought to bear on the use and conditions of detention by independent oversight of the detention estate,⁸⁷ political intervention and campaigning by civil society.

Time in Detention

European Union law imposes a maximum time limit of six months on detention during the return process (any extension thereafter is up to twelve months), but the United Kingdom has

⁸⁴ Ian Macdonald and Ronan Toal (eds), *Macdonald's Immigration Law & Practice* (Butterworths, 9th Edition, 2015) [18.59].

⁸⁵ *Ibid* [18.44].

⁸⁶ *R (on the application of AM) v Secretary of State for the Home Department* [2009] EWCA Civ 219.

⁸⁷ Eg, HM Chief Inspector of Prisons, *Inspection* 2015)
<www.justiceinspectorates.gov.uk/hmiprison/inspections/?post_type=inspection&s&prison-inspection-type=immigration-removal-centre-inspections>.

not implemented the Return Directive 2008/115/EC and is, therefore, not bound by it.⁸⁸ The, apparently, open-ended length of time an individual can be incarcerated is one of the most contentious aspects of immigration detention. However, the period in detention must be reasonable in the circumstances.⁸⁹ Many of the cases involving protracted detention relate to individuals imprisoned prior to removal or deportation, often following time served in prison for commission of a criminal offence. Protection seekers, whose claims have been refused, and who have been convicted of a criminal offence and served a prison sentence, also fall into this category. The leading case is *R (Hardial Singh) v Governor of Durham Prison*⁹⁰ (*Hardial Singh*) recently reaffirmed by the Supreme Court in *R (Lumba & Mighty) v Secretary of State for the Home Department*⁹¹ (*Lumba & Mighty*).

In *Hardial Singh*, Woolf J stated that the power to detain was impliedly limited to a period that was reasonably necessary to achieve the purpose of the detention.⁹² In *Lumba & Mighty*, Lord Dyson sought to clarify what have become known as the *Hardial Singh* principles.⁹³ Referring to his own judgment in *R (I) v Secretary of State for the Home Department*,⁹⁴ he stated that it was impossible and undesirable to produce an exhaustive list of the circumstances that are, or may be, relevant to the question of how long it is reasonable to detain a person pending deportation. However, relevant factors to consider included:

the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.⁹⁵

⁸⁸ Directive 2008/115/EC of The European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] art 15.

⁸⁹ Tom Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52(4) *International and Comparative Law Quarterly*, 841, 844-5.

⁹⁰ [1984] 1 All ER 983; [1983] EWHC 1 (QB).

⁹¹ [2012] AC 245.

⁹² [1983] EWHC 1 (QB) [7].

⁹³ [2012] 1 AC 245, 264-5 [22]. Lord Phillips dissented from this interpretation of Woolf J's judgment.

⁹⁴ [2002] EWHC Civ 888.

⁹⁵ [2012] 1 AC 245, 284 [104].

Despite these judicial endeavours to determine what relevant factors inform a determination about the reasonableness of a period of detention period, without a fixed time-limit, there is always a risk that subjectivity will creep into any assessment of ‘a reasonable period’.⁹⁶

DFT

The DFT regime has been subject to sustained judicial scrutiny. Firstly, *R (on the application of Saadi) v Secretary of State for the Home Department*⁹⁷ (*Saadi*) presented an opportunity for the House of Lords and then European Court of Human Rights (ECtHR), to reflect on the legality of seven day detention in Oakington.⁹⁸ The House of Lords established that the right to detain asylum seekers existed, citing the *Immigration Act 1971* (UK).⁹⁹ Lord Slynn of Hadley decided that applicants could be held until the refugee determination was made; there was no need to show that there was a flight risk, nor was this type of detention limited to those who could not be granted temporary admission, for whatever reason.¹⁰⁰ He opined that the large number of applicants who had to be considered quickly justified detention for a short period in acceptable physical conditions. This did not mean that the Home Secretary could detain without any limits where no examination had taken place or decision had been made. Further, the Home Secretary must not act in an arbitrary manner, and an immigration officer must act reasonably in fixing the examination time and arriving at a decision in the light of the objective of promoting speedy decision-making.¹⁰¹ For Lord Slynn the Oakington regime was reasonable and getting a speedy decision was ‘in the interests not only of the applicants but of those increasingly in the queue.’¹⁰²

The *Saadi* case also addressed the human rights implications of immigration detention. Article 5(1)(f) of the ECHR provides deprivation of liberty is permissible where ‘the lawful arrest or detention of a person [is] to prevent his effecting an unauthorised entry into the country or of

⁹⁶ The UN Working Party on Arbitrary Detention has recommended that ‘an absolute maximum duration for the detention of asylum seekers should be specified in national law’: United Nations Eco-Soc, Commission on Human Rights, *Report on the Visit of the Working Group on Arbitrary Detention to the United Kingdom on the issue of immigrants and asylum seekers*, 55th sess, E/CN. 4/1999/63/Add. 3 (18 December 1998) [35].

⁹⁷ [2002] UKHL 41.

⁹⁸ *Ibid*; *Saadi v United Kingdom* (Application No 13229/03, European Court of Human Rights – Grand Chamber, 29 January 2008).

⁹⁹ C 77, sch 2, para 16.

¹⁰⁰ *Saadi*, [22].

¹⁰¹ *Ibid* [24]-[25].

¹⁰² *Ibid* [47].

a person against whom action is being taken with a view to deportation or extradition.’ The ECtHR agreed with the United Kingdom domestic courts that ‘until a State has “authorised” entry to the country, any entry is “unauthorised” ...’¹⁰³ The European Court of Human Rights Grand Chamber did not accept that as soon as an asylum seeker has surrendered him or herself to the immigration authorities, he or she is seeking to effect an ‘authorised’ entry, with the result that detention cannot be justified under the first limb of article 5(1)(f).¹⁰⁴ The Grand Chamber decided that to interpret article 5(1)(f) as only permitting detention of a person who was trying to evade entry restrictions was far too narrow a construction.¹⁰⁵ What was important was that any deprivation of liberty had to be lawful, that is ‘a procedure prescribed by law’ had been followed and the individual was protected from arbitrariness.¹⁰⁶ To avoid arbitrariness, detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable to refugees who have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued.¹⁰⁷ Bizarrely, the ECtHR concluded that the United Kingdom authorities acted in good faith in detaining the applicant because the policy animating the Oakington regime ‘was generally to benefit asylum seekers’, and a speedy decision was in the interests not only of the applicant but of those increasingly in the queue.¹⁰⁸ Furthermore, ‘since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant’s claim to asylum, his detention was closely connected to the purpose of preventing unauthorised entry.’¹⁰⁹ But as the ministerial statements justifying Oakington attest, the purpose of the regime was never conceived of, or articulated, in terms of ‘benefitting’ asylum

¹⁰³ *Saadi v United Kingdom* (Application No 13229/03, European Court of Human Rights – Grand Chamber, 29 January 2008) [65].

¹⁰⁴ *Ibid* [65].

¹⁰⁵ *Ibid*. In any case, the United Nations High Commissioner for Refugees’ (UNHCR) own Executive Committee Conclusion on detention permitted detention of asylum seekers and refugees where necessary to verify identity or to determine the elements on which the refugee status claim is based. See United Nations High Commissioner for Human Rights, *Detention of Refugees and Asylum Seekers - Ex Com Conclusion No 44 (XXXVII) – 1986* (13 October 1986) < <http://www.unhcr.org/3ae68c43c0.html> > [b]. It also acknowledged that detention might be necessary ‘to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order’.

¹⁰⁶ *Saadi v United Kingdom* (Application No 13229/03, European Court of Human Rights – Grand Chamber, 29 January 2008) [67].

¹⁰⁷ *Ibid* [74].

¹⁰⁸ *Ibid* [77].

¹⁰⁹ *Ibid*.

seekers. Moreover, the argument that detention is needed to prevent unauthorised entry of someone who had already arrived at Heathrow airport, claimed asylum, was permitted to leave and to return in accordance with reporting instructions, was tortuous.

Further attempts to challenge the ‘superfast’ regime failed. In *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department*,¹¹⁰ the Court of Appeal held that the accelerated system did not deprive claimants of a fair opportunity to put his or her case;¹¹¹ nor was there an unacceptable risk of unfairness.¹¹² Interestingly, the fact that some people might be detained for five weeks or longer (in excess of the ‘reasonable’ time of Oakington) was not under judicial review.

Questions about the legality, fairness, reasonableness and proportionality of fast track detention were revisited in proceedings brought by Detention Action, a non-profit organisation.¹¹³ These issues were being revisited due to significant changes arising since the *Saadi* case, which had validated the first incarnation of fast track detention. There were now fewer asylum cases; the average time in detention was much longer than seven-to-ten days: 23.5 days from entry to exhaustion of appeal rights; the only criterion guiding decision-makers was whether a quick decision could be made; a very broad range of cases were included in the DFT, which had previously been considered too complex for a quick decision; there was limited scope for removal from the DFT; and a significant number of applicants were unrepresented.

In *R (on the application of Detention Action) v Secretary of State for the Home Department*,¹¹⁴ Beatson LJ concluded that ‘detention in the fast track by the application of the ‘quick processing’ criteria, after the Secretary of State’s decision and pending appeal is not objectionable in principle and does not breach the DFT Guidance’.¹¹⁵ However, he judged

¹¹⁰ [2004] EWCA Civ 1481.

¹¹¹ Ibid [6].

¹¹² Ibid [20].

¹¹³ *R (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin); and *R (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634.

¹¹⁴ [2014] EWCA Civ 1634.

¹¹⁵ Ibid [97].

that it did not satisfy the requirements of clarity and transparency established by the Supreme Court in *Lumba & Mighty*.¹¹⁶ In *Lumba & Mighty*, Lord Dyson emphasised that the rule of law required a transparent statement of the circumstances in which the broad statutory criteria would be exercised to detain a person.¹¹⁷ Lord Dyson stressed the importance of clear policy statements so that individuals knew the criteria being applied to them when detained by the executive.¹¹⁸ Additionally, Beatson LJ would have concluded (had it been necessary to decide the matter) that, on the evidence before the Court, detention could not be said to be justified.¹¹⁹ Following the case, the Home Office undertook to assess all asylum claimants in the DFT who were appealing and to release those who were not at risk of absconding. Very few were assessed as not presenting an absconding risk.

Subsequently, the Minister for Immigration and Security suspended the DFT scheme.¹²⁰ The government's application to appeal against the Court of Appeal judgment was refused in November 2015. The unravelling of fast track detention for protection seekers in the United Kingdom leaves one wondering what next? Strikingly there has, as yet, not been any declaration by the courts that detention for asylum claimants for *administrative* reasons is objectionable *per se*. Immigration detention with all its preventive (and at times punitive) undertones is under threat but appears here to stay.¹²¹

Fairer Regulation of Immigration Detention

The predicament analysed in this Chapter is not novel¹²² and it is fourfold. First, *executive officials* administer and apply the law and policy relating to deprivation of liberty absent effective oversight, that is, independent and impartial bodies (be they tribunals or courts) are

¹¹⁶ [2012] 1 AC 245.

¹¹⁷ Ibid [34].

¹¹⁸ Ibid [36]. *Lumba & Mighty* dealt with unpublished policy whereas *R (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) dealt with published policy and was, therefore, focused on breach.

¹¹⁹ Ibid [97].

¹²⁰ United Kingdom, *Parliamentary Debates*, House of Commons, 2 July 2015, col 13WS, HCWS 83 (James Brokenshire).

¹²¹ In January 2016, Stephen Shaw (Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons*, Cm9186 (2016)), was commissioned by the government, was critical of the regime and called on the Home Office to 'prepare and publish a strategic plan for immigration detention', recommendation 1. Shaw does not consider the need for immigration *per se* nor the indefinite nature of detention in the United Kingdom.

¹²² See, Tulich's discussion of counter-terrorism studies in Chapter 1.

not *routinely* required to check detention decision-making (for example, through periodic appeals, statutory reviews or bail proceedings). Secondly, substantive unfairness arises because the *necessity* of detention is not rigorously scrutinised by officials on an individual basis (as is required under international human rights law norms), habitually it stems, reflexively, from the State's characterisation of a person as unauthorised, unlawful or illegal. Thirdly, and relatedly, prolonged detention often occurs in a context that is *procedurally unfair* to detainees who are assessed by officials as posing a risk to the community, because the substantive merits and/or legality of the risk assessment are not effectively reviewable. Fourthly, the judiciary's capacity to promote the rule of law through judicial review, by policing legal limits on detention, is restricted because of (i) the expansive purposes officially underpinning and informing the statutory mandate governing detention, and (ii) due to the looseness/uncertainty afflicting 'reasonableness' as a normative constraint on the duration of detention.

In Australia, there is no access to an independent, impartial and effective review, entailing a *proportionality-based* analysis of detention for protection seekers, congruent with the views of the Australian Human Rights Commission and the United Nations Human Rights Committee.¹²³ Reform is urgently required to address the arbitrary detention of particular groups of protection seekers onshore. First, a statutory right to prompt periodic review before an independent and impartial body is warranted to guard against bureaucratic inertia and arbitrariness *pending* refugee status/visa determinations.¹²⁴ This would enable the detainee to check whether detention was merited (*qua*, necessary and proportionate) in individual circumstances. Importantly, a legal onus should rest on the immigration authorities to demonstrate, at regular intervals if required, the necessity and proportionality of detention after initial checks. Second, for 'failed' protection seekers ('hard cases', including Stateless people) who are detained *pending removal*, periodic access to external merits review to check the necessity and proportionality of ongoing detention where removal is sought but not

¹²³ See, for example, *Immigration detainees with adverse security assessments v Commonwealth of Australia (DIBP)* [2014] AusHRC 92; *FA, FB, FC and FD v Commonwealth of Australia (DIBP)* [2014] AusHRC 83; and UNHRC, *Draft General Comment 35 - Article 9: Liberty and security of person*, 107th sess, UN Doc CCPR/C/107/R.3 (28 January 2013).

¹²⁴ The Administrative Appeals Tribunal is competent to carry out a *proportionality-based* review of detention decisions fairly and efficiently – in several respects it proceeds similarly to a curial hearing. An appropriately constituted division of the Tribunal, could be empowered to determine, *inter alia*, whether secure/alternative detention, a residence determination (community detention), or visa grant subject to appropriate conditions, was the *preferable* resolution in an individual's case.

directly realisable. Third, for those ‘*declared*’ refugees subject to visa refusal or cancellation decisions on adverse security/character grounds,¹²⁵ access to periodic merits review to enable careful reconsideration of whether the risks posed to society by an individual can be managed in a less restrictive way other than resorting to indefinite detention in high-security facilities.¹²⁶

Equally, in the United Kingdom, the necessity of detention has not been adequately scrutinised. While recent case-law has confirmed the unfairness and injustice inherent in the DFT regime, and questions have been raised regarding the detention of ‘vulnerable people’,¹²⁷ no decision has been taken declaring the use of (lengthy) detention for protection seekers (and other migrants) to be legally unacceptable. Nor has domestic human rights law or the ECHR obliged the United Kingdom to rigorously and transparently ground and justify the need for detention in individual cases. Arguably, the majority judges involved in the *Saadi* litigation, while declaring administrative detention at Oakington reception centre to be legal, did not anticipate that it would be used as extensively, and for as long, as it transpired. Immigration detention is also heavily politicised in the United Kingdom, and it is unlikely that the government will resist re-employing it in accelerated asylum cases; it may be a matter of time, therefore, before a replacement detained fast track system is introduced. In the meantime, advocates must persist with legal, evidence-based, arguments to promote reforms, aimed at ensuring that immigration detention is only used as ‘a measure of last resort’.¹²⁸

Conclusions

This Chapter has examined a particular form of preventive justice: immigration detention for protection seekers. These detainees are held for *general* preventive (including deterrent) and/or administrative purposes, often in circumstances where they have not committed crimes (though there may have been civil law violations or anticipated infractions). Rather,

¹²⁵ A related problem is the limited access protection seekers have to merits review, and the limited utility of judicial review, over ASIO’s adverse security assessments.

¹²⁶ Joint Select Committee on Australia’s Immigration Detention Network, *Final Report* (2012) chs 6 and 7; and Australian Human Rights Commission, *Immigration detention at Curtin: observations from visit to Curtin immigration detention centre and key concerns across the detention network* (2011).

¹²⁷ Shaw, above n 123.

¹²⁸ United Nations High Commissioner for Human Rights, *Detention Guidelines – Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) (online).

protection seekers' incarceration stems from their irregular movement and border crossings and concomitant 'unauthorised' status under municipal laws. Their confinement may persist for months, years even, pending entry-related decisions or removal, deportation or exclusion.

Preventive immigration detention is highly problematical where it is applied indiscriminately and by reason of:

- (a) *harm prevention* (national security/public welfare/flight risk), in circumstances where the protection seeker is prevented from testing those grounds (and evidence) openly and effectively,
- (b) *administrative convenience* – an adjunct to (ostensibly, timely) adjudicative processes about protection seekers' claims and their legal status, and
- (c) *facilitating removal/deportation/exclusion* of individuals, in circumstances where there is no real prospect of expulsion to another State.

Additionally, judicial application of 'reasonableness', to delimit the lawful duration of detention, has not prevented prolonged and arbitrary periods of detention, while administrative processes are undertaken or removal/deportation/exclusion is realised. In view of the comparative case law explored in this Chapter, and the punitive experiences of many detainees, a better label for the form of preventive justice examined here would be preventive injustice.¹²⁹

¹²⁹ See David Dyzenhaus, 'Preventive Justice and the Rule-of-Law Project' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 9, 92; and Bernadette McSherry, 'Sex, Drugs and Evil Souls' (2006) 32(2) *Monash University Law Review* 237, 271-2.